Muy Pizza Southeast, LLC *and* Steven Gregory Colvin. Case 15–CA–174267

August 6, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE AND EMANUEL

On December 15, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed an exception and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining a mandatory Agreement to Arbitrate that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S.Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint must be dismissed.[1]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 6, 2018

John F. Ring, Chairman

Mark Gaston Pearce, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph A. Hoffmann, Jr. Esq., for the General Counsel.
William A. McNab Esq., for the Respondent.
Mark A. Potashnick Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. The charge was filed on April 18, 2016, and a complaint was issued on July 28, 2016. In substance, the complaint alleges that the Respondent has required as a condition of employment that employees agree to be bound by an agreement requiring them to arbitrate employee disputes and to do so on an individual basis.

On October 14, 2016, the parties filed a joint motion to submit the case on a stipulation of facts.

Upon consideration of the stipulated record and the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Rebecca Anderson has held the position of Respondent's store manager and has been a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

During the fall of 2014, the Charging Party went to Respondent's facility in Gulf Breeze, Florida, to apply for a job. There were no openings at the time so the Charging Party left his name and contact information.

Around early March of 2015, the Respondent's store manag-

[1] We therefore find no need to address other issues raised by the Respondent's exception.

To the extent the judge's decision implies that the Respondent's Agreement to Arbitrate also unlawfully restricts the filing of unfair labor practice charges with the Board, that issue was not included in the Statement of Issues Presented in the parties' Joint Motion and Stipulation of Facts and thus was not litigated and is not before the Board.

er, Anderson, called the Charging Party and invited him to apply for a job as a delivery driver. He was instructed to submit an application online. On March 3, 2015, the Charging Party filled out an application at https://my.peoplematter.at/panhandlepizza/hire.

As part of the application process, the Charging Party was required to sign an "Agreement to Arbitrate", which the Charging Party signed on March 3, 2015.

In pertinent part, the "Agreement to Arbitrate," a copy of which is attached to the stipulation, states as follows:

> Because of the delay and expense of the court systems, MUY Pizza Southeast on behalf of itself and its parents and affiliates, officers and directors (collectively, "Pizza Hut") and I agree to use confidential binding arbitration, instead of going to court, for any claims, including any claims now in existence or that may exist in the future (a) that I may have against Pizza Hut and/or its current or former employees or (b) that Pizza Hut may have against me. Without limitation, such claims include any concerning wages, expense reimbursement, compensation, leave, employment (including, but not limited to, any claims concerning harassment, discrimination, or retaliation), conversion, breach of fiduciary duty, and/or termination of employment. This Agreement to Arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1 et seq. Nothing in this Agreement to Arbitrate shall prohibit me from filing, participating in, or pursuing action with an administrative agency in accordance with applicable law, including the filing of charges or claims with the National Labor Relations Board or the Equal Employment Opportunity Commission, or the filing of a workers' compensation claim or unemployment claim with an applicable state agency. In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will apply, except that (a) Pizza Hut will pay the arbitrator's fees; (b) if I am the one filing the claim, Pizza Hut will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court; and (c) as discussed below, the arbitration shall occur only as an individual action and not as a class, collective, representative, or consolidated action.
>
> Pizza Hut and I agree that any and all claims subject to arbitration under this Agreement to Arbitrate may be instituted and arbitrated only in an individual capacity, and not on behalf of or as a part of any purported class, collective, representative, or consolidated action (collectively referred to in this Agreement to Arbitrate as a "Class Action"). Furthermore, Pizza Hut and I agree that neither party can initiate a Class Action in court or in arbitration in order to pursue any claims that are subject to arbitration under this Agreement to Arbitrate. Moreover, neither party can join a Class Action or participate as a member of a Class Action instituted by someone else in court or in arbitration in order to pursue any claims that are subject to arbitration under this Agreement to Arbitrate. It is the parties' intent to the fullest extent permitted by law to waive any and all rights to the application of Class Action procedures or remedies with respect to all claims subject to this "Agreement to Arbitrate." It is expressly agreed between Pizza Hut and me that any arbitrator adjudicating claims under this Agreement to Arbitrate shall have no power or authority to adjudicate Class Action claims and proceedings or to rule on the validity and enforceability or the class action waiver provided for herein. The waiver of Class Action claims and proceedings is an essential and material term of this Agreement to Arbitrate, and Pizza Hut and I agree that if it is determined that it is prohibited or invalid under applicable law, then this entire Agreement to Arbitrate is unenforceable.
>
> I acknowledge and agree that this Agreement to Arbitrate is made in exchange for my employment or continued employment, as well as the mutual promises contained in this Agreement. This Agreement to Arbitrate is not and shall not be construed to create any contract of employment, express or implied. This Agreement to Arbitrate does not in any way alter the "at-will" status of employment with Pizza Hut, meaning that either I or Pizza Hut may terminate the employment relationship at any time, with or without advance notice, and with or without cause. This Agreement to Arbitrate supersedes any and all prior agreements to arbitrate entered into between me and Pizza Hut.

Since at least March 3, 2015, the Respondent has been requiring employees, as a term and condition of employment, to sign the "Agreement to Arbitrate."

On March 9, 2015, the Charging Party began working for the Respondent as a delivery driver.

On February 5, 2016, the Charging Party, on behalf of himself and other employees similarly situated, filed a complaint in the United States District Court for the Northern District of Florida (Pensacola Division), asserting that Respondent has been failing to pay employees the minimum wage required by the Fair Labor Standards Act (FLSA). The case number of the FLSA claim was 3:16-CV-00046. On March 14, 2016, the Respondent filed its answer denying it was violating the FLSA.

On April 11, 2016, the Respondent's attorney in the FLSA claim sent an email to the attorney for the Charging Party which contained, as an attachment, a copy of the "Agreement to Arbitrate." Respondent's attorney indicated that it appeared that the "Agreement to Arbitrate" was enforceable in the United States 11th Circuit Court of Appeals and that "it changes things quite a bit."

On April 15, 2016, based on the "Agreement to Arbitrate", the Respondent and the Charging Party filed a stipulation of dismissal without prejudice in the FLSA claim and on April 18, 2016, the FLSA claim was dismissed by the Court.

On April 21, 2016, the Charging Party filed a "Statement of Claim" with the American Arbitration Association identical to the FLSA claim. On May 31, 2016, the Respondent filed its answer in the arbitration proceeding and denied that it was violating the FLSA. As of the date of this motion and stipulation, the AAA arbitration is currently pending.

Analysis

This is another in a long line of cases involving an employer's implementation of a policy requiring employees to enter

into agreements that waive their right to utilize any legal process other than arbitration, to enforce collective interests in relation to wages, hours, and terms and conditions of employment.[1]

The Board's position, despite reversals by several circuit courts, is that an employer will violate Section 8(a)(1) of the Act if it requires its employees to execute agreements to utilize arbitration to resolve employment disputes and that preclude employees from acting in concert to bring class actions, whether in court or before an arbitrator.

In my capacity as an administrative law judge of the NLRB, I am bound to follow Board precedent irrespective of contrary opinions by circuit courts, unless and until the Supreme Court makes a definitive ruling on the subject matter in dispute.

In my opinion, this case is controlled by the Board's decision in *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), enf. denied 808 F.3d 1013 (5th Cir. 2015). In that and subsequent cases, the Board has held that requiring employees to sign class action waivers, with or without an "opt out" clause, is a violation of Section 8(a)(1) of the Act.

It is true that the Respondent's arbitration agreement excludes charges that might be filed with various agencies including the National Labor Relations Board. But this provision contains no explanation of the types of charges that might be subject to NLRA jurisdiction. As such, it is my opinion that no reasonable employee could possibly understand what types of employment charges would or could be excluded from the arbitration requirement and it therefore cannot serve as a defense. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 6 (2015), where the Board stated:

> It would be unclear to the reader (especially to a reader without specialized legal knowledge) whether and to what extent the subsequent language creating an exception for filing charges with Federal agencies modifies the previous broad prohibition on pursuing any form of collective or representative activity… This ambiguity would lead a reasonable employee to wonder whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus serves as another reason to affirm the judge's finding that the Agreements unlawfully prohibit filing charges with the Board.[2]

CONCLUSIONS OF LAW

By maintaining a policy that requires employees (a) to waive the right to bring class actions or to act concertedly in regard to their terms and conditions of employment and (b) to waive the right to initiate lawsuits regarding their collective terms and conditions of their employment, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having concluded that the Respondent has unlawfully maintained a policy that requires its employees to arbitrate employment disputes and which precludes class or collective actions by employees, I shall recommend that it be ordered to rescind or revise that policy to make it clear to employees that the policy and any agreements to arbitrate made pursuant to the policy do not constitute a waiver in all forums of their rights to maintain class or collective actions relating to their wages, hours or other terms and conditions of employment. I shall also recommend that the Respondent be required to notify its employees of the rescinded or revised policy.

In addition, I shall recommend that the Respondent upon request, agree to a voluntary dismissal of the pending arbitration proceeding and agree to the reinstatement of the complaint that was filed in the United States District Court for the Northern District of Florida (Pensacola Division), case number 3:16-CV-00046.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Muy Pizza Southeast, LLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a policy that compels employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the mandatory arbitration policy, or revise it to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums or that requires employees to waive their right to maintain employment related class and collective claims in all forums, whether arbitral or judicial.

(b) Notify all current and former employees who were required to sign or otherwise become bound by the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them with a copy of the revised policy.

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[1] In view of the large number of NLRB cases that have dealt with this issue over the past few years, it seems that these types of policies and agreements have become common, even ubiquitous among companies of sufficient size to have a human resource manager or department. In this regard, I think that it would fair to assume that the number of cases reaching the Board by way of unfair labor practice charges represents only the tip of the iceberg. Accordingly, it may be increasingly difficult for a prospective employee to turn down a job where this type of agreement is required as a condition of employment inasmuch as the next employer to whom he or she applies will likely have the same requirement.

[2] See also *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 3 fn. 2 (2016).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Upon request, agree to a voluntary dismissal of the pending arbitration proceeding and agree to the reinstatement of the complaint that was filed in the United States District Court for the Northern District of Florida (Pensacola Division), case number 3:16-CV-00046.

(d) Within 14 days after service by the Region, post at its Gulf Breeze, Florida facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 15 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the Arbitration Policy was made available to them. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 15, 2016.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a policy, or any agreements made with employees pursuant to that policy, that waives the right of employees to maintain class or collective action in any forum.

WE WILL NOT require employees to sign binding arbitration agreements that prohibit collective and class litigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL upon request, agree to a voluntary dismissal of the pending arbitration proceeding and agree to the reinstatement of the complaint that was filed in the United States District Court for the Northern District of Florida (Pensacola Division), case number 3:16-CV-00046.

MUY PIZZA SOUTHEAST, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-174267 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.